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1 disclosure," comma, "at the end or somewhere in the
2 sentence or blurb for each one, and add in the failure
3 to disclose actual labor hour and cost history from
4 prior performance relating to the product being
5 manufactured." Do you see that?

6 A. I do.

7 Q. Do you recall that you thought that by June
8 26th at 8:03 a.m. in the morning, that the report
9 looked good?

10 A. That's what I said.

11 Q. Okay, and that you were down to a couple of
12 nits and nats.

13 MR. PRESS: Objection.

14 A. Yeah, I did say with a couple of nits and
15 nats, yes.

16 Q. Okay. Take your time sheets out.

17 A. What's the exhibit again?

18 Q. It's Exhibit Number 2.

19 A. Yeah.

20 Q. Do you see in Exhibit Number 2 your time
21 entries, I think on the 25th, you had billed four
22 hours to the file?

23 A. Yeah.

24 Q. Right? Now, what I'm trying to get to is

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1 A. No, I think what I just said, based on
2 looking at my time records and given the schedule that
3 we went over this morning in terms of when drafts even
4 came about, it looks like about ten.

5 Q. Ten what?

6 A. Hours.

7 Q. Ten hours for what?

8 A. For report-related type of issues.

9 Q. Okay.

10 A. Again, and just to be clear, when we're
11 talking about report issues, there's really the report
12 and the file and doing it back and forth, they're all
13 interconnected, so I'm just trying to give you my best
14 recollection based upon looking at the time records
15 and the time frames that you're asking about.

16 Q. Okay, and you actually believe that you
17 spent somewhere in the neighborhood of ten hours
18 reviewing the draft report, revising, editing and
19 providing comments to the draft report by June 25th.

20 A. Well, looking at my time sheet, that's --

21 Q. I'm not asking you to read from your time
22 sheet.

23 A. That's the only basis I have for the
24 recollection, so either I'll look at the time sheet

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1 how much time had you spent, you personally spent on
2 this report before you got to the conclusion as stated
3 in the e-mail that the report was looking good with
4 the exception of some nits and nats that you had?

5 A. Well, if you just look at the time records,
6 you can see I'm through, whatever that date is, June
7 -- say close of business June 25th, early June 26th,
8 just add it up, somewhere over 20 it looks like.

9 Q. How much of that 20 hours that you're adding
10 up was spent actually on the report itself?

11 A. Well, as you pointed out, I think we were
12 doing with the --

13 Q. Not the we. We're on the you.

14 A. Obviously I don't have total recall on every
15 day and what we were doing. I can only go by looking
16 at these time records, so I think the first time we
17 had a draft that was even, or whatever these exhibits
18 say that we went over this morning, it was a few days
19 before that in terms of a draft of the report, so I
20 don't know, around ten.

21 Q. You're saying --

22 A. On the draft.

23 Q. -- you have a memory that you personally
24 worked about ten hours on the draft?

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1 and give you my recollection or I'll say I have no
2 recollection as to how many hours I had.

3 Q. Well, I can read from the time sheet too.

4 A. Then go ahead.

5 Q. Okay, so you have no independent memory.

6 A. No.

7 Q. Okay. What were the nits and nats? Do you
8 remember?

9 A. No.

10 Q. Your time entry indicates that you had a
11 discussion with counsel on June 25th. Do you see
12 that?

13 A. Yes.

14 Q. Did you have such a discussion?

15 A. Well, that's what the -- that's what the
16 time sheet indicates. I don't specifically recall one
17 way or the other from other recollection beyond
18 reading my time sheet.

19 Q. Okay. Do you have any memory of what you
20 talked about?

21 A. No.

22 Q. Okay, all right. Let me hand to you what
23 we'll mark as the next exhibit, which will be McGeehin
24 Exhibit 12. For the record, it's an e-mail from Ed

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1 Giddings to you and Mr. Krafft dated June 26th, 2009.
 2 Do you recognize this document?
 3 A. Yes.
 4 Q. Okay. It says in the e-mail -- well, you
 5 received a copy. You received this e-mail, I take it,
 6 right?
 7 A. It shows that I was copied on it.
 8 Q. Okay. It says, quote, "I have faxed the
 9 report to K and M," period. "They would like to
 10 discuss it with us at 2:00 this afternoon. Pat, on
 11 what number can you be reached?" Do you see that?
 12 A. I do.
 13 Q. Was Mr. Giddings' office in the same office
 14 complex as yours?
 15 A. We both work out of the Bethesda, Maryland
 16 office, yes.
 17 Q. Okay, okay. And do you recall, were you in
 18 the office on June 26th?
 19 A. I don't recall.
 20 Q. Okay. Do you have more than one number at
 21 your office in Bethesda?
 22 A. Probably. Do I have more than one line,
 23 yes.
 24 Q. Well --

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1 A. In my office, there are two phones, there
 2 are two lines, if that's what you're asking me.
 3 Q. So it's separated by one digit, I take it?
 4 A. Yeah, I know -- I usually use the 4160. I
 5 don't even know what the other line is.
 6 Q. The fact that Mr. Giddings is asking for a
 7 number where he can reach you, does that suggest to
 8 you you weren't in the office that day?
 9 A. Yes.
 10 Q. Because he would know your telephone number
 11 after 20 years together, right?
 12 A. Again, Mr. Giddings wasn't 20 years
 13 together, but he would know my telephone number after
 14 how long he's been.
 15 Q. How long have you been with Giddings?
 16 A. I think Giddings has been with me for about
 17 seven years, plus or minus, as I testified this
 18 morning.
 19 Q. Okay, all right. Do you have any memory of
 20 any discussions with counsel on June 26th about the
 21 draft report?
 22 A. Not specifically, no.
 23 Q. Do you know if the draft that was faxed was
 24 in any way materially different than what became your

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1 ultimate opinions in this case in the report that has
 2 been marked as Exhibit Number 5?
 3 A. I don't know.
 4 Q. Okay. Let me hand to you what we'll mark as
 5 the next exhibit, which will be McGeehin Exhibit 13.
 6 A. Thanks.
 7 Q. Sure. Do you recognize this document, sir?
 8 A. Yes.
 9 Q. What is it?
 10 A. Well, it's two e-mails, looks like one from
 11 Ed Giddings to Rita Gaskin, who's one of our
 12 administrative people, with some of the changes, and
 13 then one from me to Ed Giddings attaching certain
 14 comments to the report.
 15 Q. Okay, and whose comments are these?
 16 A. Well, the e-mail seems to indicate that the
 17 attachments would be my comments on here, although
 18 they're not red lined. The only thing red lined is
 19 two items on page 9.
 20 Q. Well, there's actually --
 21 A. Maybe there's some other.
 22 Q. I think there are actually.
 23 A. Okay.
 24 Q. But you don't remember if these are your

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1 comments or someone else's?
 2 A. Let me just look at -- well, I don't see the
 3 other ones you're talking about. I'm seeing on page 9
 4 two -- I don't remember on item 3 there whether those
 5 were my -- my comments or not. They're kind of minor,
 6 so I don't know.
 7 Q. Okay. Do you see where on the first page,
 8 it says, quote, "Ed, here are my comments. I think we
 9 are basically there now. Just need to add documents
 10 considered and make sure we are comfortable with all
 11 the support," period. Do you see that?
 12 A. Yes.
 13 Q. What did you mean by add documents
 14 considered?
 15 A. There's a section of this, section 3 that we
 16 went over, attachment 3 --
 17 Q. Uh-huh.
 18 A. -- saying add all the documents considered.
 19 Q. Well, as of June 29th, the date of this
 20 draft, had you considered more documents than those
 21 that are identified in attachment 3?
 22 A. It looks like attachment 3 that's attached
 23 to this draft looks like after all changes were
 24 accepted, and it looks like that Mr. Giddings' draft

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1 that he's sending to Rita saying go ahead and
2 finalize. So whether there are -- I could compare
3 each item in attachment 3 of this draft with what we
4 had in the final report and see whether we added
5 certain documents to this that hadn't yet been listed,
6 but I don't recall. In fact, there are. There's 26
7 items listed here, and it turns out there are 66 items
8 in our report.

9 Q. Well, had you considered -- in the final
10 report, there are 66 items, I agree, and I'm looking
11 at them. Why weren't they contained in the draft that
12 has been marked as Exhibit Number 13?

13 A. I don't know. That's why I think we want to
14 make sure we listed everything out. I don't
15 specifically remember if Ed and I had a discussion as
16 to whether we needed to list all the items out or not,
17 and that may have contributed to what was the final
18 listing of every document. I just don't -- I just
19 don't remember the timing.

20 Q. Okay. Hand to you what we'll mark as the
21 next document, which is Exhibit 14. Do you recognize
22 this document?

23 A. Just from being copied on it, yeah.

24 Q. Do you know if this -- well, strike that.

1 Q. That's a fair question. Was there a
2 procedure in place to make sure that everybody was
3 working off of one draft?

4 A. Ultimately that's the goal.

5 Q. Okay, I understand that's the goal.

6 A. Right.

7 Q. And we lawyers do it all the time, and the
8 worst thing you could have is you have three lawyers
9 putting edits into a draft and there are three
10 different drafts floating around, and that can be a
11 problem, particularly when you have sign-off
12 authority. Did your place of business have a
13 procedure to make sure that there was one place where
14 the draft was kept and all edits would go into that
15 draft at that one place?

16 A. Yes and no.

17 Q. Okay.

18 A. Okay.

19 Q. Do you want to explain?

20 A. Yes.

21 Q. Go ahead.

22 A. Yes in terms of on the server, the copy that
23 Matt and Ed would be dealing with and sending to Rita
24 should be working off that same server draft; however,

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1 For the record, Exhibit Number 14 is an e-mail from
2 Matt Krafft to you and Mr. Giddings dated June 30th,
3 2009 attaching a copy of the draft report; is that
4 right?

5 A. Yes.

6 Q. Okay. Do you recognize this as being the
7 next or another iteration of the draft?

8 MR. PRESS: Objection.

9 A. Yeah, I don't know whether it was the next
10 or another or the same, but the two red lines that we
11 talked about in that last draft are shown -- the same
12 red lines are shown on page 9. I don't know the
13 timing of when those comments would have been.

14 Q. Okay.

15 A. Because he mentions here on June 30 that he
16 -- he's made some edits on 3 and 9.

17 Q. Uh-huh.

18 A. So I don't know whether he made those two.
19 They're obviously minor, but I don't know whether he
20 made those here or whether they were carried forward.

21 Q. Okay. Now, was there a procedure in place
22 at the time for how to deal with the drafts?

23 MR. PRESS: Objection.

24 A. I don't know what you mean by procedure.

1 when they attach it to an e-mail and send it to
2 someone, then obviously that could be a second draft
3 or a separate draft.

4 Q. Okay.

5 A. Or if I -- or if I attach something to an
6 e-mail, that would be the same case.

7 Q. Okay. Do you see where it says in the
8 e-mail, "If not already done, you may want to
9 cross-reference a copy of the action paragraphs in
10 report section 4 to the documents in the notebook for
11 the depo binder." Do you see that?

12 A. Yes.

13 Q. What did you understand that to mean?

14 A. I think that's Matt just generally saying to
15 Ed hey, as we often do and as I did in this case, for
16 the depo binder, you take a copy of the report and
17 cross-reference it back to some of the documents that
18 we've looked at that relate to the specific -- each of
19 the ten specific items.

20 Q. What are the action paragraphs?

21 A. I don't know what -- that's a phrase, I
22 don't know what he meant by the phrase action
23 paragraph, but report section 4 is the -- each of the
24 -- should have said 3 I think, were the actions --

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1 where it's actions taken. I don't think action
 2 paragraph meant anything except as we said actions
 3 taken by Herley, but it should say report section 3.
 4 Q. Uh-huh.
 5 A. In fact, I think the way -- let me just
 6 double-check this, but -- yeah, it should have
 7 actually been -- there's a typo there that should say
 8 report section 4, but in the draft on page 7, it says
 9 report section 3, so that was just a typo, so Matt had
 10 it right, but this -- what was attached to it says 3.
 11 Q. Okay. Do you have any memory of having any
 12 discussions with Mr. Krafft or Mr. Giddings about the
 13 draft marked as Exhibit 14?
 14 A. And again, with respect to any of these
 15 drafts, I don't have specific recollections on each
 16 draft. This was just a continuous process.
 17 Q. And as you see on the last page, attachment
 18 3, at least as of what he's sending around, he being
 19 Mr. Krafft is circulating as of June 30th, 2009, there
 20 are only 26 documents identified.
 21 A. Yes.
 22 Q. Do you know why?
 23 A. Same answer as I gave earlier. I don't
 24 know.

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1 Q. You've heard of Professor Nash, haven't you?
 2 A. Yes.
 3 Q. How is it that you've heard of him?
 4 A. He is a -- was a professor at George
 5 Washington University in the government contracts
 6 program.
 7 Q. Did you attend any of his classes?
 8 A. I don't think I ever attended any of his
 9 classes.
 10 Q. He has authored a number of books on
 11 government contracting. You're aware of that?
 12 A. Yes, sir.
 13 Q. Are you familiar with those books?
 14 A. I'm familiar that they're out there, yes.
 15 Q. Okay. Do you know what they're called?
 16 A. I know some of them. He's got several, one
 17 on contract formation I think or something like that
 18 and changes and claims. I think he's authored or
 19 coauthored three or four books, maybe more.
 20 Q. With his -- with Professor Cibinic --
 21 A. With John, yes.
 22 Q. -- who used to be with us.
 23 A. Yes, he's passed away.
 24 Q. You don't quarrel that he's an expert in

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1 government contracting, do you?
 2 A. No.
 3 Q. Is one of the books "Federal Procurement
 4 Law," third edition, volume 1, 1977, volume 2, 1980?
 5 A. Again, I haven't memorized them, but that
 6 sounds right.
 7 Q. Do you own copies of the books?
 8 A. I know we have some of them in our offices.
 9 Whether those two particular ones, I don't know, but I
 10 know we have some in our office.
 11 Q. Do you refer to his books from time to time
 12 as recognized authority?
 13 A. I don't remember a specific reference to
 14 them in a particular case, but I wouldn't quibble,
 15 again, with him -- with him being, you know, well
 16 known and an expert in government contracts.
 17 Q. Including the FAR.
 18 A. Yeah.
 19 Q. Okay.
 20 A. Yeah.
 21 Q. And from time to time when you're doing
 22 research about whether or not something does or
 23 doesn't run afoul of certain provisions of the FAR,
 24 you go and look at the treatises that he authored with

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1 Professor Cibinic?
 2 A. I wouldn't exclude them, but as I said, I
 3 don't remember ever going particularly and, you know,
 4 referencing one or relying upon it, if that's what
 5 you're asking, but again, I'm not quibbling with his
 6 expertise.
 7 Q. Okay, and you know, you and he disagree on
 8 certain matters in this case.
 9 A. Apparently.
 10 Q. Have you read his report?
 11 A. I have.
 12 Q. In fact, you prepared a draft of a rebuttal
 13 report, didn't you?
 14 A. Yes.
 15 Q. Well, did you prepare it or did the other
 16 guys prepare it?
 17 A. Actually, that report, I think I probably
 18 prepared the bulk of that.
 19 Q. Okay, all right, just trying to understand
 20 --
 21 A. I mean, as with any report, it's kind of an
 22 iterative process, but I'm certainly very involved
 23 with that.
 24 Q. Okay, all right. Let me hand to you what we

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1 marked as Exhibit 15.
 2 A. Got it.
 3 Q. Let's get your report out, which is Exhibit
 4 5.
 5 A. Got it.
 6 Q. Let's start with page 2 of your report,
 7 Exhibit 5, page 2.
 8 A. Okay.
 9 Q. Do you see in the second paragraph, it says
 10 certain things that you relied upon?
 11 A. Yes.
 12 Q. Okay. Is there anything else that you
 13 relied upon? And I'm not trying to trick you.
 14 A. Yeah.
 15 Q. So let me tell you what I'm focused in on.
 16 Are you relying upon that certain matters which are
 17 alleged as a fact will in fact be -- evidence will be
 18 offered and a fact-finder will accept as a fact those
 19 facts?
 20 A. Yes.
 21 Q. Okay. Can you tell me which facts you're
 22 relying upon for proof of the fact and acceptance by
 23 the fact-finder of the fact, and if it's all of
 24 section 4, you can just say so and that will make

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1 things go quicker. If it's not, you'll point it out
 2 to me.
 3 A. Right, so it's all listed I think within
 4 section 4, and then each of the ten items would have
 5 specific issues that are -- that are relying upon a
 6 particular fact.
 7 Q. Okay.
 8 A. So I can go through each one of those if
 9 that will be helpful.
 10 Q. I think it would actually, and I'm going to
 11 ask you to -- here's a marker. I want you to
 12 highlight for each of the ten paragraphs what you are
 13 relying upon for either evidence and slash or
 14 acceptance by a fact finder.
 15 A. Do you want me to mark it on the copy that's
 16 been -- that's in the record or just on my side copy?
 17 Q. You should be looking at Exhibit Number 5,
 18 not the notebook.
 19 A. Oh, oh, oh, oh, got you, got you.
 20 Q. And that's the original.
 21 A. They're the same thing. That's fine, that's
 22 fine.
 23 MR. PRESS: Although the notebook is in the
 24 record also.

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1 THE WITNESS: That's fine.
 2 MR. PRESS: But we'll go with Exhibit 5.
 3 Can you just read back the last question or
 4 instruction actually please?
 5 - - -
 6 THE REPORTER: Question: "I want you to
 7 highlight for each of the ten paragraphs what you are
 8 relying upon for either evidence and slash or
 9 acceptance by a fact finder."
 10 - - -
 11 THE WITNESS: I think actually, after
 12 looking at it, I think in general, the ten items that
 13 we're listing there, each of those has to be proved by
 14 -- as evidence in court.
 15 BY MR. SMITH:
 16 Q. Okay, there has to be proof of the
 17 fact-finder would have to accept them.
 18 A. Yes.
 19 Q. Okay, all right. So we don't need to go
 20 over each one. We don't need to highlight it. I'll
 21 take my highlighter back unless you want it. If you
 22 want it --
 23 A. I thought I was going to steal it.
 24 Q. You can have it if you want.

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1 A. That's all right.
 2 Q. All right.
 3 A. Yeah, I think just so the record's clear,
 4 there may be issues in here, sir, that I looked at
 5 documents relating to the underlying factual issue,
 6 but ultimately that -- the ten issues will have to be
 7 -- some of them will have to decide that these things
 8 in fact happened.
 9 Q. And Mr. McGeehin, just to state the obvious,
 10 I can see by your C.V. that you're not new to this
 11 business and you probably Googled me and realized that
 12 I'm not new to this business, and it's perfectly
 13 acceptable for experts to rely or to assume facts to
 14 be true.
 15 A. No.
 16 Q. We're not breaking any new ground here.
 17 A. Okay.
 18 Q. Okay?
 19 MR. PRESS: Objection.
 20 BY MR. SMITH:
 21 Q. So I just wanted to get a clear record about
 22 what you are assuming to be true, and now I have.
 23 Let's go to page 3 of your report. You put a
 24 definition of cost and pricing data there, right?

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1 A. Yes.
 2 Q. Were you the one who actually did the
 3 cutting and the pasting and moved this definition into
 4 the report?
 5 A. I think Mr. Giddings did this.
 6 Q. Okay, and do you know -- strike that. Do
 7 you remember revising or editing the definition that's
 8 set forth on page 3 of your report about cost or
 9 pricing data?
 10 A. I don't remember editing it.
 11 Q. Is it a complete definition?
 12 A. No, but in my binder, I do have a complete
 13 definition.
 14 Q. Okay. Excuse me for one second. I'm
 15 looking for a document that I know I have. Let me
 16 hand to you what we'll mark as the next exhibit, which
 17 is Exhibit Number 16. Do you recognize Exhibit Number
 18 16?
 19 A. Yes.
 20 Q. What is it?
 21 A. This is an interim FAR part 2 that gives
 22 definitions of certain words and phrases.
 23 Q. And is there a definition of cost or pricing
 24 data contained in Exhibit 16?

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1 A. Yes, page -- well, there's no page on it,
 2 but these are alphabetical, so --
 3 Q. Yeah, they are.
 4 A. It's in the C's.
 5 Q. About eight pages in. That's my
 6 approximation. Now, can you tell me why your
 7 definition of cost or pricing data doesn't conform
 8 with the definition that's actually in the FAR?
 9 MR. PRESS: Objection.
 10 BY MR. SMITH:
 11 Q. Or maybe in your mind it does. Does it?
 12 A. Yeah, it's -- it is not -- it doesn't have
 13 the entirety of the definition included in there.
 14 Q. Okay. Let's highlight -- I'll give you
 15 another opportunity to make off with this highlighter.
 16 Highlight for me in Exhibit Number 16 the language
 17 that was omitted.
 18 MR. PRESS: Objection.
 19 A. Okay, so in Exhibit 16, highlight what's not
 20 included.
 21 Q. Uh-huh.
 22 A. Is that what you're saying?
 23 Q. Yeah.
 24 A. Okay.

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1 Q. Now, you know what an ellipses is, right?
 2 A. A what?
 3 Q. See those three little dots there?
 4 A. Yes.
 5 Q. You know what that represents, right?
 6 A. Yeah, that there's stuff in between there.
 7 Q. I'm on Exhibit 5, page 3 in the definition
 8 of cost and pricing data. So -- well, first of all,
 9 did you highlight the information that was omitted?
 10 A. Yes, I've highlighted in Exhibit 16 the
 11 information that we did not summarize in our report on
 12 page 3.
 13 Q. Okay. When you say summarize, you were
 14 quoting verbatim, right?
 15 A. The language that is reflected on the bottom
 16 of page 3 are verbatim out of the FAR.
 17 Q. Right.
 18 A. But it's not the complete definition of cost
 19 and pricing data in FAR part 2.
 20 Q. Okay. Well, in your report, you say, "Cost
 21 or pricing data is defined at FAR 2.101 as follows,"
 22 and then you have a block quote there, right?
 23 A. Right.
 24 Q. And then you give a signal to the reader

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1 through those three dots that information was
 2 eliminated, right?
 3 A. Because it's in the middle of a sentence.
 4 Q. Okay, but then there's other information
 5 that was eliminated and you don't give the three dots.
 6 A. Yeah. Not -- not by any intention.
 7 Certainly anybody can look at the definition of FAR
 8 part -- of the FAR definition of cost and pricing
 9 data. What we were just trying to do was highlight
 10 the salient points that we thought were important in
 11 terms of the point we were trying to make at the
 12 bottom of page 3.
 13 Q. Okay, so you thought that the information
 14 that you eliminated was irrelevant.
 15 A. I'm not saying irrelevant. It's just that
 16 we were trying to highlight a particular point at the
 17 bottom of page 3, and so there's an excerpt from the
 18 definition.
 19 Q. No, but you give a partial definition of
 20 cost and pricing data, right?
 21 MR. PRESS: Objection.
 22 A. Yeah, the definition at FAR part 2.101
 23 includes more than what's reflected at the bottom of
 24 page 3.

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1 Q. Well, if we wanted to be a hundred percent
2 accurate, the sentence that says, "Cost or pricing
3 data is defined at FAR 2.101 as follows," it's not
4 defined that way at 2.101, correct?

5 MR. PRESS: Objection.

6 A. Well, the language included at page 3 is
7 included in that definition.

8 Q. Right. It's a part of the definition.

9 A. Yeah.

10 Q. Okay. So if we wanted to be a hundred
11 percent accurate, we would say that cost or pricing
12 data is defined, comma, in part, comma, at FAR 2.101
13 as follows.

14 A. Sure, but I mean, my only point is, you
15 know, obviously by us putting the reference to FAR
16 2.101, we're not trying to -- trying to disguise the
17 fact that there could be more there than that.

18 Q. Okay. Why didn't you include the whole
19 sentence or the whole -- I'm sorry, the whole
20 explanation, whole definition?

21 A. We could have. It's just that this is the
22 point that we were trying to highlight, and that's why
23 we included it.

24 Q. Okay. I'm just trying to understand why you

1 include the data forming the basis of the judgment on
2 a contract. Yeah, so all of it can be relevant, and
3 there was -- I don't recall any specific reasoning as
4 to why something was taken out or left in except that
5 we were just trying to highlight this aspect of FAR 2
6 dash 101, but as I said, not a lot of -- at least a
7 lot of my gray matter was put into excluding or
8 inputting language. It was just to kind of frame it
9 out in terms of what the issues were.

10 Q. Okay, all right. Turn if you would to page
11 7 of your report.

12 A. Okay.

13 Q. Okay. In the introductory part of section
14 4, you make reference to defective pricing, right?

15 A. Let's take a look. Yes.

16 Q. What is defective pricing?

17 A. It's pricing that is not current, accurate
18 or complete.

19 Q. Okay. And as I appreciate you're citing ten
20 examples with respect to the power heads in which
21 you're of the opinion that there was defective
22 pricing, and thus, a -- the company, Herley, ran afoul
23 of FAR principles?

24 A. I would say either defective pricing or a

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1 were highlighting this point as opposed to the whole
2 point.

3 A. Well, I mean, we could have.

4 Q. Okay. I understand that, and you didn't,
5 and I'm trying to understand why.

6 A. I'm not sure a lot of thought was given to
7 that.

8 Q. Okay. Were you involved in the decision to
9 define cost and pricing data this way, or was this
10 Giddings' idea?

11 MR. PRESS: Objection.

12 A. I don't -- I don't recall. He might have --
13 he might have had more, I took some out, I don't
14 remember, or vice versa.

15 Q. Okay, now, some of the language that you
16 took out is as follows. "Cost or pricing data are
17 factual, not judgmental and are verifiable." Did you
18 think that that sentence was relevant to any of the
19 issues that are at issue in this litigation?

20 A. Could be.

21 Q. You just don't know one way or the other as
22 you sit here?

23 A. It all could be relevant, and you can
24 include the next sentence where it says they do

1 FAR violation.

2 Q. Okay, okay. Now let's focus on each one,
3 and I'm going to try to understand why it is that you
4 and Professor Nash disagree with each other.

5 A. Yeah.

6 Q. Okay? Let's start with your report, item
7 number 1. "In response to the Navy's December 20" --
8 I'm sorry, "December 2000 solicitation for power
9 heads, Herley established a target price in the range
10 of 19,000 to 20,000 based on, among other things, an
11 undisclosed contingency cost," period. Let me stop
12 right there. What do you mean, a target price?

13 A. The target price, again, as I understand the
14 deposition testimony of Mr. Blatt, was that he came up
15 with -- he thought this thing should cost about
16 \$20,000, somewhere between 19 and 20 thousand, so
17 that's in my view what I meant by the phrase "target
18 price."

19 Q. Okay, so it wasn't as if someone picked a
20 number out of the air and then said all right, now
21 let's figure out a way how we can justify this number,
22 right?

23 A. I think it's exactly Mr. Blatt picked the
24 number out of the air and then said how are we going

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1 to justify. That's my understanding, pick the number,
 2 said 20 grand is what I want the number to be, and
 3 then back-fill.
 4 Q. What witness said that Mr. Blatt did that?
 5 A. I think Mr. Blatt himself in his deposition.
 6 Q. You're saying that Mr. Blatt testified that
 7 he picked a number out of the air for the power heads;
 8 is that right?
 9 A. No, I didn't say out of the air. You asked
 10 -- you asked -- you asked -- you asked me did -- who
 11 testified about that issue.
 12 Q. No, let's make sure we're real clear here.
 13 Let's first define target price. What do you
 14 understand target price to be?
 15 A. As it being used in this context, target
 16 price was what Mr. Blatt wanted to sell these items
 17 for.
 18 Q. Okay, and so Mr. Blatt -- so target price
 19 means to you the price that Mr. Blatt indicated that
 20 he wanted to charge the government for a particular
 21 power head.
 22 A. Right.
 23 Q. That's right? Okay.
 24 A. Yes.

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1 Q. And in that -- using that definition, there
 2 is nothing that runs afoul of the FAR about having a
 3 target price, right?
 4 A. No.
 5 Q. Your target price could be the result of
 6 sitting down doing an estimate and coming up with a
 7 price, right?
 8 A. Could be.
 9 Q. Okay. Now, are you saying that Mr. Blatt
 10 came up with his target price in some way other than
 11 sitting down doing an estimate and coming up with a
 12 price?
 13 A. Yeah, my understanding is that he did not go
 14 through a detailed coming down and estimating and
 15 coming up with a price, that he picked a number that
 16 he wanted to sell the power head for and that was --
 17 he thought he said 20,000. The testimony said 19 to
 18 20 thousand.
 19 Q. You're saying that he picked a number
 20 without regard to doing some form of a bottoms-up
 21 estimate.
 22 A. That's my understanding.
 23 Q. Okay. Show me where he said that.
 24 A. Well, just because he doesn't say that he

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1 did a bottoms-up estimate. Again, I'm assuming that.
 2 Whether that's true or not, it is.
 3 Q. No, I understand, you're assuming it, and at
 4 least in this instance, you're telling me the basis
 5 for your assumption by directing me to Mr. Blatt's
 6 testimony, right?
 7 A. Yes.
 8 Q. Now, what day -- what day are you looking at
 9 of Blatt's testimony?
 10 A. In my binder, I have it May 27th.
 11 Q. Okay. And what pages and what lines?
 12 A. The discussion starts at -- let's see here,
 13 120, 121.
 14 Q. 120 and 121, okay. You're looking at what
 15 tab in your -- what's been marked as Exhibit 1?
 16 A. First tab.
 17 Q. Okay. And what pages -- I'm sorry, you gave
 18 me the pages, 120 and 121?
 19 A. Yes.
 20 Q. Okay, and you're saying that those are --
 21 well, which lines in particular on 120 and 121?
 22 A. Well, it all goes -- keeps going up through
 23 125, but basically he's talking about first he
 24 recommended to Mr. Tuckman -- the question said 19 to

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1 19,5, and he says I think I recommended 20, and then
 2 the discussion is in the elements, so he had -- he had
 3 at least in his mind doubled the cost of the elements
 4 to get to that number.
 5 Q. To get to what number?
 6 A. To get to his -- well, theoretically to get
 7 to his 19 to 20 thousand dollar target price.
 8 Q. Okay, and how did he establish the rest of
 9 the price?
 10 A. I don't know.
 11 Q. What pages of Blatt's testimony did you read
 12 other than the ones that are attached as tab 1 to
 13 Exhibit 1?
 14 A. I think there might -- there's some
 15 additional testimony in tab 8 of my binder that goes
 16 from page -- there's about, I don't know -- I don't
 17 know how many pages are here, but there's maybe ten
 18 pages, so times four, maybe 40 pages.
 19 Q. Are you aware that in Mr. Blatt's
 20 deposition, he offered an explanation about how he
 21 came up with his price for the power heads?
 22 MR. PRESS: Objection.
 23 A. I don't recall specifically how he came up
 24 with his price.

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1 Q. Are you -- you know what a molded can is?
 2 A. What I do remember -- no, I don't know what
 3 a molded can is, but I remember him making a point
 4 that he made some kind of a comment that there were
 5 some issues he thought with a molded can and one other
 6 part and that would drive the price --
 7 Q. Correct.
 8 A. That would drive his price up in his mind.
 9 Q. Did he have an estimate for the molded can
 10 that went into the price?
 11 A. I don't recall ever seeing any estimate
 12 where he built up to that 19,500 price.
 13 Q. Did he testify what his estimate was?
 14 A. If he did, I don't remember.
 15 Q. Okay. He didn't have to sit down and make a
 16 fancy document that says estimate in order to come up
 17 with an estimate, right?
 18 A. No, he didn't have to make a fancy document,
 19 and if there were no cost and pricing data later, you
 20 know, he could have a target price and that's fine.
 21 Q. When you say a target price, sir, do you
 22 mean to imply that there's something wrong with that?
 23 A. That's what I just said, if -- if you're in
 24 a non-cost-justified mode or atmosphere, you can pick

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1 a price and put it in and that's it.
 2 Q. Was Mr. Blatt at least as you understood the
 3 testimony utilizing his judgment in connection with
 4 coming up with his price for a power head?
 5 A. I think initially that would be his
 6 judgment, yes.
 7 Q. Okay. Now, he had been in the business for
 8 how long?
 9 A. A long time. I don't know the exact number
 10 of years.
 11 Q. Was he familiar with the technology to build
 12 a power head?
 13 MR. PRESS: Objection.
 14 A. I don't know. I would assume he was but I
 15 don't know.
 16 Q. Okay. Do you take any issue with him
 17 utilizing his judgment to come up with an estimate?
 18 A. Not initially, no.
 19 Q. Okay. And I take it that you don't have any
 20 views about what you think the price should have or
 21 shouldn't have been, right?
 22 A. Not a specific number, no.
 23 Q. Okay. Now, going back to that same sentence
 24 in paragraph 1 where you make reference to the

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1 undisclosed contingency cost, that was -- that
 2 undisclosed contingency cost was the doubling of the
 3 cost for an element --
 4 A. Right.
 5 Q. -- in his estimate, right?
 6 A. Right.
 7 Q. Now, in and of itself -- strike that. Do
 8 you know if there was any cost history available at
 9 the company at the time, General Microwave, about what
 10 the labor costs were to build an element?
 11 A. The labor or the labor and materials?
 12 Q. Labor.
 13 A. Labor. I know that Mr. Blatt testified that
 14 there wasn't -- that the data was not good.
 15 Q. Okay.
 16 A. I don't know if -- I don't know
 17 independently whether --
 18 Q. Okay.
 19 A. -- they did or they didn't.
 20 Q. All right. There was nothing that
 21 prohibited Mr. Blatt from doubling his estimate.
 22 A. At that time --
 23 Q. Right.
 24 A. -- that he did it, no.

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1 Q. Okay.
 2 A. And by that time, I mean for the original
 3 quote of the 21.
 4 Q. Okay. Reading on in paragraph 1, it says,
 5 "Specifically, Herley arrived at this target price
 6 range by doubling the cost of the element component
 7 power head from 4,500 to 9,000," and that -- Mr. Blatt
 8 testified to that, right?
 9 A. Yes.
 10 Q. Okay. Reading on, it says, quote, "I have
 11 been informed that Herley did not disclose this
 12 contingency during negotiation of the power head
 13 contracts or during pre-award audit," period. "As
 14 stated above, the cost of the element was a
 15 significant part of the cost to the power head,"
 16 period. "Doubling the cost estimate of the element
 17 had a material impact on the total cost of the power
 18 head," period. "As such, subsequent negotiated power
 19 head contract prices agreed to by the government
 20 incorporated this material defect," period. Let me
 21 stop there. So you're testifying that in your view,
 22 Mr. Blatt or someone from Herley was required to tell
 23 the government during the negotiation that the
 24 estimate for the element had been doubled from 4,500

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1 to 9,000.
 2 A. Yes.
 3 Q. And when was that disclosure required?
 4 A. Prior to the agreement on price for the 42
 5 units, which would have been in I guess July of 2001.
 6 Q. And who was required to disclose it?
 7 A. Herley.
 8 Q. Okay. Did you as part of forming an opinion
 9 here make an assessment about when the disclosure was
 10 required?
 11 A. Not day by day except to say that a
 12 disclosure is required, and as consistent with my
 13 report and Nash's report, as a date of agreement on
 14 price.
 15 Q. And you think the date of the agreement was
 16 when?
 17 A. I think the award was July of 2001 on the 42
 18 units, and then February 20th of 2002 for the 139
 19 units.
 20 Q. Okay. Now, turn if you would to Exhibit
 21 Number 15, Professor Nash's report.
 22 A. Got it.
 23 Q. I think if we just -- you've read this
 24 before, right?

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1 A. Yeah.
 2 Q. Okay. Turn to the third page.
 3 A. Yeah.
 4 Q. Do you see where he says, quote, "FAR
 5 15.407-1 requires price reduction for submitting
 6 defective cost of pricing data," paren, "not current,
 7 accurate or complete," closed paren, "but there is no
 8 similar requirement if the offeror fails to submit,"
 9 quote, "judgmental factors," closed quote, "or
 10 contingencies," closed quote, period. Do you see
 11 that?
 12 A. Yeah.
 13 Q. Do you agree with it?
 14 A. Not necessarily.
 15 Q. Okay. So you disagree about what 15.407
 16 requires.
 17 A. Right.
 18 Q. Tell me what is the basis for your
 19 disagreement.
 20 A. Yeah, and I think it's -- as I've started to
 21 draft in the response and my comments to Mr. Nash, I
 22 think there can be times when what he's saying is
 23 true, that there's no -- there's no requirement to
 24 submit judgmental factors or contingencies, I mean as

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1 part of a price reduction for defective pricing under
 2 cost and pricing data. I think we both agree, FAR
 3 part 15 requires you to submit both of those
 4 judgmental factors and contingencies. So I can really
 5 stop there and say we have a FAR violation.
 6 Now, going further from there and saying
 7 okay, is it cost and pricing data, which is kind of
 8 layer 2, I think Mr. Nash in a vacuum can offer some
 9 opinions about this, and that's fine. I think you
 10 have to take into context here the totality of what
 11 Herley was doing, and if you -- if you recall, the way
 12 that they were putting their cost data together and
 13 submitting it to the government was not based upon
 14 really an estimate in the first instance of a build-up
 15 as you use it, a bottoms-up cost build-up, which if
 16 you look at the back and forth between the parties,
 17 you would assume that it was. Here's our estimate for
 18 labor hours that we came up with, here's our total
 19 labor dollars, here's our material, and in that
 20 context, by not disclosing something as fundamental as
 21 the existence of the contingency, there's no question
 22 if -- you can't later second-guess the doubling versus
 23 the halving versus the tripling or whatever the -- you
 24 can't say in that particular instance that the fact

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1 that a particular contingency did or didn't happen,
 2 that's different. You know, you can't say well now I
 3 want my money back for that. That's different from
 4 did you give the government the information that
 5 formed the basis for the way that you put your bid
 6 together, and I would say -- I would just say right
 7 there Herley failed to do that, and that was relevant
 8 information in accordance with the definition of cost
 9 or pricing data under the FAR.
 10 Q. I'm going to move to strike the
 11 nonresponsive part of your testimony and I'm going to
 12 ask you again. We're focused on the first sentence of
 13 Professor Nash's report. "FAR 15.407-1 requires price
 14 reduction for submitting defective pricing or pricing
 15 data," paren, "not current, accurate or complete, but
 16 there is no similar requirement if the offeror fails
 17 to submit judgmental factors." That's in quotes, or,
 18 quote, "contingencies," closed quote. Did I read that
 19 correctly?
 20 A. You read it correctly.
 21 Q. Okay. And you disagree with what the
 22 professor says here, right?
 23 A. Yes.
 24 Q. Okay. In a nutshell, tell me why you

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1 disagree with his explanation of the requirements of
2 15.407-1.

3 A. Did I -- isn't that what you just asked to
4 strike? I just did that. I went through and
5 explained to you, because I think that these -- this
6 contingent -- the fact that there was a contingency
7 and the fact that judgmental factors had been baked
8 into the calculations, that is a fact that would meet
9 the definition of cost and pricing data as opposed to
10 just some contingency that he feels doesn't need to be
11 disclosed for some reason.

12 Q. So you think there are gradations of
13 judgmental factors?

14 MR. PRESS: Let him finish his answer.

15 A. Let me finish my answer. We're talking
16 about an issue of disclosure, right, which Professor
17 Nash says yes, you do have to disclose contingency,
18 but there's no -- if you don't, no harm, no foul,
19 there's no impact from that.

20 Q. I'm not sure we agree on what Professor Nash
21 --

22 A. Okay.

23 Q. -- says and doesn't say, but he's going to
24 be here I think next week to say what's on his mind.

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1 A. Well, I'm just reading his report. That's
2 all.

3 Q. I don't agree that you're reading by his
4 report. Let me read from his report where it says
5 quote, "Thus, the failure to identify a contingency
6 does not constitute a violation of the FAR requirement
7 to submit current, accurate and complete cost or
8 pricing data," period, closed quote. Do you see that?

9 A. Yes.

10 Q. Do you agree with that?

11 A. I think I just went -- went through that. I
12 just went through that. He -- Nash says that you have
13 to -- back on the page before there, says that you
14 have to disclose any contingencies in your proposed
15 price. Where we differ -- okay.

16 Q. Again, rather than argue about summaries, I
17 don't want to argue with you.

18 A. Okay.

19 Q. I just want to be able to hand this
20 transcript to Professor Nash and say here's why
21 McGeehin disagrees with you --

22 A. Okay.

23 Q. -- in a nutshell, okay? You guys can duke
24 this out before a jury and they'll decide if they're

1 going to believe you or him, okay? But Nash is not
2 conceding in opinion 1 that there was a violation of
3 the FAR.

4 MR. PRESS: Objection.

5 BY MR. SMITH:

6 Q. But whether he is or isn't, your lawyers, or
7 not your lawyers, but the lawyers for the plaintiffs
8 can ask him and he's going to say whatever he's going
9 to say, but I'm focused on a particular sentence in
10 the last paragraph, his conclusory sentence which
11 says, "Thus, the failure to identify a contingency
12 does not constitute a violation of the FAR requirement
13 to submit current, accurate and complete cost or
14 pricing data," and I just want to ask you, yes or no
15 do you agree with that?

16 A. I disagree with that.

17 Q. You disagree, okay.

18 A. Yeah.

19 Q. So you think he's wrong?

20 A. Yes.

21 Q. Okay. And you think he's wrong because?

22 A. Because in this case, the fact that there is
23 a contingency was not disclosed. Not the amount of
24 the contingency. So -- and I hate -- I apologize for

1 giving you a long answer. Sometimes they're not in a
2 nutshell, but in this particular case, because of the
3 way that the proposal developed, that contingency and
4 the failure to disclose that contingency was critical
5 and would be considered cost or pricing data in my
6 view.

7 Q. Okay, so this focuses on a unique set of
8 factual circumstances in your mind?

9 A. Yes.

10 Q. And what are those unique facts that you're
11 assuming to be true?

12 A. Several. One, the fact that the target
13 price, using my definition as we discussed on the
14 record, of in that 19 to 20 thousand became pretty
15 much the price that ran through all of the submissions
16 and negotiations for the 42 units. Second, the fact
17 that a tutorial by another person at Herley in another
18 division that wasn't even meant to be the estimate for
19 this -- for this contract, where \$19,900 became a bid,
20 and then not coincidentally, it would appear based
21 upon just watching the evolution, that number was
22 backed into, all of which presuppose at the outset in
23 the target price that we had this doubling of the
24 estimate for the element.

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1 Q. Okay. Let's break that down a little bit.
2 The price that actually went to the government, was
3 that supported by Mr. Blatt's estimate?

4 A. Which price? Which one?

5 Q. One that he testified to at his deposition,
6 how he came up with the price.

7 A. I would say no.

8 Q. Why?

9 A. Because the original number that went to the
10 government was an exact number of, you know, \$19,897.
11 I think I have the right number. Yeah, 19,897, which
12 was not based upon what Blatt had -- had talked about
13 except that it's in the ball park. And secondly, it
14 was based upon a, quote, tutorial by Mr. Rounsaville,
15 who had sent it over to Herley Farmingdale as an
16 example of how you might kind of put a price together,
17 and that then became the price that went to the
18 government.

19 Q. What was the difference between Blatt's
20 estimated price and the Rounsaville number that you're
21 talking about?

22 A. If it was 20, it was in -- within dollars.

23 If it was 19.5, it was within \$500, so close.

24 Q. Whose number was higher?

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1 A. Well, the deposition transcript of Blatt
2 seemed to say he was saying he thought 20, and then
3 the number that went in on a tutorial was 19, I want
4 to say 897 from Mr. Rounsaville. I'm not sure I'm
5 saying that right. Rounsaville. But what I'm saying
6 is outside of just trying to come to \$20,000, my
7 understanding is there was no connection between the
8 methodology used to estimate the 19,897 and whatever
9 methodology that Blatt may or may not have used to
10 come up with his ball park of 20,000.

11 Q. Well, what was Blatt's methodology to get to
12 20,000 other than the 9,000 for the element?

13 A. That's all I know, and the two points you
14 brought out that you said that he thought he had two
15 problems in talking to --

16 Q. You're talking about the molded can and the
17 connector?

18 A. Yeah.

19 Q. Was there anything -- did he do estimates
20 for the molded can and the connector?

21 A. You know, I don't remember.

22 Q. So you didn't factor those into your
23 analysis.

24 A. No, I didn't -- I didn't factor it into my

1 analysis. I don't have any sheet of paper from Blatt
2 coming up to that 20 thousand. All I know for sure is
3 the doubling of the element.

4 Q. You don't have a sheet -- you don't have a
5 sheet of paper about the doubling of the element
6 either, right? You have his testimony.

7 A. Testimony, right.

8 Q. Right, and to the extent he testified about
9 how he came up with the 20,000, no one's brought it to
10 your attention and you haven't read it, other than the
11 doubling.

12 A. No, I do remember, as I testified half hour
13 ago, that there were issues with respect to those two
14 issues, and -- but I don't remember him doing a
15 calculation --

16 Q. Okay.

17 A. -- showing those dollars.

18 Q. Okay. Show me where in the Blatt testimony
19 in your book you have testimony about the two issues,
20 the doubling and the -- not the doubling. The molded
21 can and connector. Which tab should I go to?

22 A. I don't know that we do, but let me check.

23 We have some of Blatt's testimony at tab 8, and if I
24 could look at the original -- the one point, the

1 original that's been marked for the deposition has
2 some highlighting in it --

3 Q. Oh, sure.

4 A. -- that didn't copy in the two copies here.

5 Q. Here you go.

6 A. Yeah, thanks.

7 Q. Sure.

8 A. Yeah, this is some of the discussion in here
9 about the historical pricing.

10 Q. I'm on molded cans and connectors.

11 A. Yeah, I'm just getting there. I don't have
12 total recall on all this. Here's what I had
13 remembered reading that you had asked me about
14 earlier, page 229.

15 Q. Okay.

16 A. And on page 229, he's estimating how he came
17 up with the material costs associated with the \$9,500
18 bid, and he says, "I think it was in the range of
19 three or four thousand. I know all the small bits and
20 pieces. I think I estimated 2,000. The major
21 problems were the connector and the molded can."
22 That's what you were talking about.

23 Q. Uh-huh.

24 A. And then on 230, "How did you" -- "How did

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1 you get these prices in that range?" "By my
2 experience." And then it goes on and on. I don't
3 know if you want -- you just asked me specifically to
4 identify where the discussion of the connected and
5 molded cans were in Blatt's testimony, May 27th, 2009,
6 page 229 and 230.

7 Q. So that was in connection with his
8 explanation about how he established the material part
9 of the estimate that he did?

10 A. Yeah, I mean, that's -- that's what I --
11 that's what I remembered reading about this can thing
12 that you talked about.

13 Q. Okay, okay, and he was offering testimony to
14 support what number in his estimate?

15 A. Well, it's a little unclear, but this had to
16 do with the \$9,500 intercompany bill.

17 Q. Ninety-three or 95?

18 A. Well, it turned out to be 9,000 I think that
19 was -- the question said 9,300.

20 Q. Wasn't it 9,300? Which tab are you looking
21 at, by the way?

22 A. Okay, this is tab number 8, page 229.

23 Q. Page 229, okay. On line 16 at 229, the
24 question's asked, quote, "If as you said before, the

1 Q. Well, that's what I asked.

2 A. Okay, so we're off of that.

3 Q. Yeah, you see here he's giving you an
4 explanation about how he came up with the estimate to
5 support his number, which you like to call target
6 price, right? What's wrong with it?

7 A. Well, this -- this now is on to the estimate
8 of the subassembly.

9 Q. Okay.

10 A. We're talking about now the bid from Farming
11 -- from Lancaster to Farmingdale as to how they came
12 up with this \$9,000 number for the subassembly.

13 Q. You don't take issue with that in your
14 opinion?

15 A. Not in the opinion that we were just talking
16 about. Back in -- back in opinion number 8, which
17 we'll get to, I do take exception to the fact that the
18 cost information at the time would seem to suggest
19 that the estimate for the materials was nowhere in
20 that range. All he's talking about here is if you use
21 his rule of thumb of a third, a third, a third, and
22 you take a third of 9,000, isn't that about 3,000, and
23 he says yes. I'm not sure how -- how penetrating and
24 detailed that kind of an estimate is, but it is what

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1 material costs were generally one-third of the overall
2 bid, and if the estimated bid you had for the
3 subassembly was 9,300, do you recall the material cost
4 for the subassembly being in the range of 3,000?"

5 Answer: "I think it was in the range of three to four
6 thousand. I know all the small bits and pieces I
7 think I estimated at 2,000. The major problems were
8 the connector and the molded" -- it says "can." It
9 should be "can."

10 A. Yeah.

11 Q. Question: "How do you estimate the price in
12 the \$2,000 range?" Answer: "By my experience."

13 Question: "Did you go and look at any catalogs for
14 pricing, you know, a part that was necessary to make a
15 subassembly?" Answer: "If I may, if you have this
16 room to paint," and then you can read as well as I
17 can, right?

18 A. I'm not sure, but I can read it.

19 Q. You can't read?

20 A. No, I said as well as you.

21 Q. Oh, that's all right. What's wrong with
22 this estimate?

23 A. I didn't know that we were on to wrong with
24 the estimate. You just had asked me where it was.

1 it is.

2 Q. Okay. Are you expressing an opinion in this
3 case about the \$9,300 that was part of the bid for the
4 subassembly to be built in Lancaster?

5 MR. PRESS: Objection.

6 A. Opinion 8, we have a discussion about that.
7 I'm not giving an opinion that I know what the number
8 was or -- I mean, should have been.

9 Q. Right.

10 A. I'm just saying that that estimate, based on
11 other contemporaneous information, didn't seem to be
12 supported, and that other information wasn't shared.

13 Q. Okay. Well, let's wait until we get to 8
14 then and we'll --

15 A. Okay.

16 Q. Let's move on to opinion number 2.

17 A. All right.

18 Q. Back to your report, and hopefully the air
19 conditioning guy will come here and relieve us of this
20 80 degree temperature we find ourselves in.

21 A. Part of the strategy, right.

22 Q. Opinion number 3, quote, "In forming his bid
23 on the first power head contract with the Navy,"
24 comma, "Herley did not rely upon historical data

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1 regarding the per-unit power head price charged in
2 prior bids or the labor hours or material costs
3 associated with the manufacture of power heads." Let
4 me stop right there. How do you know that's true?
5 What facts do you have, or are you just assuming that
6 again?

7 A. No, because -- because we know that the
8 exact amount that went in was based upon
9 Mr. Rounsaville's calculation, which he describes in
10 his testimony as a tutorial, just as an example of how
11 you might do something a third, a third, a third.

12 Q. What historical data about labor hours and
13 material costs was available at the company at the
14 time of this bid?

15 A. Well, it depends. At the time of the bid --

16 Q. Or at the time of the agreement.

17 A. Well, up through the time of the agreement
18 -- well, short answer is I don't know exactly with
19 respect to the first power head contract for 42 units
20 what information, actual data existed from Herley.

21 Q. Okay. Now, reading on, it says, next
22 sentence, quote, "Instead, Herley started with the
23 target price of the range of 19 thousand to 20
24 thousand and backed into the amounts for labor,

1 A. I don't think -- I don't know that Mr. Blatt
2 did. I wasn't saying that he did.

3 Q. Okay. And you're saying you're relying upon
4 Rounsaville's comment for this backed into concept?

5 A. Yes.

6 Q. Reading on in your report, same paragraph,
7 it says, "Those costs which were not based on
8 historical data assumed that the target price of
9 approximately 20,000 would consist of one-third
10 material costs, one-third labor costs and one-third
11 overhead and profit." You got that from Rounsaville's
12 testimony?

13 A. I think -- well, you can get that from
14 Rounsaville's actual estimate, and I think it's also
15 in Blatt's testimony that he said generally it's a
16 third, a third, a third.

17 Q. Okay, now, let's take a look at what Nash
18 says.

19 A. Yes.

20 Q. In Nash's report, he says -- you see where
21 it says opinion 2?

22 A. Yes.

23 Q. "Asserts that Herley not rely on historical
24 data," in quotes, "in arriving at its estimate. This

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1 material and overhead costs." Do you see that?

2 A. Yes.

3 Q. Mr. Blatt never testified that his \$20,000
4 figure that he came up with was a result of starting
5 with a target number and backing into it, did he?

6 A. I don't know whether he did or not, but
7 Mr. Rounsaville did.

8 Q. Okay, but didn't Blatt tell you how he came
9 up with his number?

10 MR. PRESS: Objection.

11 A. We already went through this. I don't think
12 so. I don't know how he came up with his specific
13 number of 20,000 except to know that he doubled the
14 price -- his estimate -- first of all, it wasn't even
15 -- let's be clear on that. It wasn't doubling his
16 cost of the element from 4,500 to 9,000. It was his
17 doubling of an estimate of the element from 4,500 to
18 9,000, and then the two issues that you raised about
19 the connector and the cans, which I don't know
20 specifically what calculations he might have done to
21 factor those in.

22 Q. But Mr. Blatt never testified that he was
23 involved in any way, shape or form in terms of backing
24 into a number, did he?

1 opinion reflects a fundamental misunderstanding of the
2 FAR requirement," period. "The cost or pricing data
3 provisions constitute a disclosure requirement, not a
4 use requirement." Okay. Do you agree with that?

5 A. Yes.

6 Q. Okay. Reading on, it says, "The purpose of
7 the requirement is to ensure that the government
8 personnel have the same factual information as the
9 offeror when they are negotiating prices," period. Do
10 you agree with that?

11 A. Generally, yes.

12 Q. Okay. Reading on, it says, quote, "This
13 allows the government personnel to evaluate the
14 validity of the offeror's estimate and to come up with
15 their own estimate for purposes of negotiating the
16 ultimate price," period. Do you see that?

17 A. Yeah.

18 Q. Reading on, it says, quote, "There is no
19 requirement that the contractor use the cost or
20 pricing data to arrive at its proposed price." Do you
21 see that?

22 A. Yes.

23 Q. Do you agree with that?

24 A. Yeah, I'm okay with that general opinion. I

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1 think he just missed what I was saying. We make a
2 comment in the beginning that they did not rely on
3 historical data, but that's just framing out the
4 issue. Our conclusion -- my conclusion is at the end
5 that they didn't disclose their whole pricing
6 technique at the time they submitted and agreed to the
7 price.

8 Q. Okay. Opinion number 3, your report,
9 Exhibit 5, states, quote, "Historical sales data
10 indicates that Herley sold power heads to various
11 customers from 1989 through 2001. The sales price for
12 those power heads ranged from \$3,795 per unit for
13 seven units sold to Fleet International in 1997 to
14 7,500 for one unit sold to SEACAL in 1998. The cost
15 estimates for power heads readily provided to the Navy
16 in 2001, including an 11 percent profit, were 20,241
17 per unit for 42 units, and 18,775 per unit for 139
18 units. I have been informed that during price
19 negotiations with the Navy, Herley did not disclose
20 the historic sales data." Did I read that correctly?

21 A. Yes, sir.

22 Q. Okay. So you're taking issue with, assuming
23 it's to be true, that Herley didn't disclose
24 historical sales price information.

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1 A. Yes.

2 Q. Okay. Now, do you know if the Navy already
3 had that sales price information?

4 A. I don't know. I don't know if they had all
5 of it. They may have.

6 Q. Did they have any of it?

7 A. I don't know.

8 Q. Okay. Now, what was sold to SEACAL in 1998?
9 Do you know?

10 A. All I have is -- all I have is in my binder,
11 a listing of the sales.

12 Q. Right. Do you know what it was that was
13 sold to SEACAL?

14 A. The power head.

15 Q. Was it the same thing that the Navy was
16 buying from Herley in 2001?

17 A. I think it was.

18 Q. Why do you say that?

19 A. Because of the model number.

20 Q. And Fleet Industrial, the sale in 1996, what
21 was sold to Fleet?

22 A. Same.

23 Q. How much money did General Microwave make on
24 the units that were sold to Fleet Industrial?

1 A. Don't know.

2 Q. Did they lose money?

3 A. Don't know.

4 Q. Same question with respect to SEACAL.

5 A. Yeah, same answer.

6 Q. Now let's go to Professor Nash. He says in
7 his report, Exhibit 15, he states in pertinent part,
8 quote, "Opinion 3 asserts that Herley did not disclose
9 historic sales data." That's in quotes, "historic
10 sales data," period. "Contract prices have not been
11 considered to fall within the definition of cost or
12 pricing data because they are known to government
13 personnel," period. Let me stop right there. Is that
14 true?

15 A. If -- I would say maybe if you know that the
16 government has them, that may be true.

17 Q. Okay. What about his statement contract
18 prices have not been considered to fall within the
19 definition of cost or pricing data? Do you agree with
20 that?

21 A. No. I think that only goes with the rest of
22 the sentence. He's saying because they're known to
23 the government. I would think if you -- even if you
24 take that sentence at its face, the flip side is if

1 they are not known to the government, then I guess
2 they would be considered cost and pricing data.

3 Q. Well, but wouldn't you then have to cross
4 out the word "because" and add the word "if"?

5 MR. PRESS: Objection.

6 A. Maybe I shouldn't have jumped up, as you
7 said. He can answer that old question, whether he
8 would say if or because.

9 Q. Oh, he did. He put "because" in his report.

10 A. No, I'm saying whether you could substitute
11 "if" or "because." I'll let him answer that question,
12 whether you could substitute "if" or "because."

13 Q. Okay, Mr. McGeehin, he's already answered
14 the question. He put in his report what he thinks the
15 state of the universe is, and I'm just trying to
16 understand if you disagree, why you disagree.

17 A. Yeah.

18 Q. And you're saying that Professor Nash is
19 wrong?

20 A. I think in this case, given the great
21 variation in the prices we're talking about here,
22 given the -- given the fact that these do not appear
23 to all be government sales, they might be to
24 subcontractors under a government sale and the

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1 government may not have access to sales to GE, to
2 Martin Marietta, to Fleet Industrial. The ones
3 obviously that they sold directly to the Navy, that's
4 one thing, but those that were not sold to the Navy
5 but to a prime contractor, I'm not sure they would
6 have access to that information, and I would think the
7 government would definitely view them as relevant and
8 would help put them on equal footing with the
9 contractor in terms of negotiating a price.

10 Q. Did anyone from the government ever tell you
11 that they believed that historic sales data, sales
12 prices from prior sales, constitute cost and pricing
13 data?

14 MR. PRESS: Objection.

15 A. No one ever told me. I mean -- you mean did
16 anybody ever tell me -- I didn't speak to anybody from
17 the government on this case.

18 Q. Did you ever see any authority for the
19 proposition that you advanced that contract prices are
20 considered within the scope of cost and pricing data,
21 historic contract prices?

22 A. I would think there would be a couple of
23 areas of authority.

24 Q. Okay. You're looking at Exhibit 16?

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1 A. Yes. I think there's a reference -- let's
2 take a look at that.

3 Q. Are you in section 2.101, the definitional
4 section?

5 A. Yeah.

6 Q. Are you under cost and pricing data?

7 A. Yeah.

8 Q. Because you see what the professor says,
9 right, in his report?

10 A. Yeah.

11 Q. It says -- he says, quote, "Note that they
12 are not included in the list of types of cost or
13 pricing data in the FAR 2.101 definition set forth
14 above."

15 A. Right.

16 Q. Do you see that? Do you agree with that?

17 A. I don't see it listed outside -- yeah,
18 exactly, except for information on changes in
19 production methods or purchasing volume, but I will
20 admit that they don't list out sales on other items.

21 Q. Okay, but you wanted to look some other
22 place?

23 A. I was just looking for the general
24 definition within cost and pricing data, prudent

1 buyers and sellers would reasonably expect to affect
2 price negotiations, so there's one source. The second
3 is in this particular case, there was a question
4 coming back from DCAA back to Herley on just the bill
5 of materials on the assemblies -- on the \$645 on the
6 bill of materials, and they said hey, you sold these
7 before for 645, what gives, and there was a discussion
8 back and forth. It was a little confusing, but at
9 least it stands for the proposition that a prior
10 sale -- and that was just the subassembly material
11 aspect, but stands for the proposition that the
12 government would be interested in prior sales and the
13 level of price.

14 Q. So you're saying that because the government
15 asked about the material quote in a prior power head
16 sale, that that meant that Herley's nondisclosure of
17 historic sales data constituted a FAR violation?

18 A. No, I've reached my own opinion why it would
19 constitute a FAR violation. You asked me what -- was
20 there any -- what do I know that would help support
21 that proposition, and that's what I was just giving
22 you. If you're wondering whether the government would
23 be interested in that kind of information and
24 negotiation, to put them on a level playing field, I

1 think the answer is yes.

2 Q. Did the government ask during the
3 negotiations what the historic sales data showed?

4 A. I don't know.

5 Q. Well, doesn't that kind of contradict what
6 you just said?

7 A. No.

8 Q. No?

9 A. No.

10 Q. Even though the government didn't ask, but
11 you think they'd be interested, but did they forget to
12 ask?

13 MR. PRESS: Objection.

14 A. I don't know, but what I do know is that no
15 contractor in a false claim, defective pricing FAR
16 violation can rely upon the fact that the government
17 didn't do something to avoid an otherwise problem for
18 them under the federal acquisition regulation.

19 Q. So as I appreciate, you're saying that there
20 was a mandatory obligation to disclose as cost and
21 pricing data what the prior sales history showed by
22 way of price, right?

23 A. Yeah, know I don't about mandatory
24 obligation. I would say in my judgment under industry

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1 practice, in this set of facts and circumstances, they
2 should have disclosed.

3 Q. Can you cite us to any authority to support
4 that?

5 A. I just did. The general definition of what
6 cost and pricing data is, the general definition that
7 we just talked about is data that prudent buyers and
8 sellers would reasonably expect to affect price
9 negotiations.

10 Q. Right, and you think that's the authority.

11 A. Yeah, I think -- yeah, I think -- I think if
12 I were asked by this client, you know, should we tell
13 them about these and we're not sure they know about
14 them, I'd say yes.

15 Q. So the -- the eight examples of what does
16 constitute cost and pricing data in the definitional
17 section, you don't -- it's not persuasive to you that
18 prior sales prices is not contained in here.

19 A. No, I mean, look -- look at the language.
20 The sentence before that, cost or pricing data are
21 more than historical accounting. They're all facts
22 that can reasonably expect to contribute to the
23 soundness of estimates of future costs and the
24 validity of determination of costs incurred. They

1 Q. You ready to proceed, sir?

2 A. Yes.

3 Q. Okay. I'm on opinion number 4 in your
4 report, and that deals with the cost work-up, the
5 estimate for the labor associated with the element; is
6 that right?

7 A. Yes.

8 Q. Why don't you take a moment and review it to
9 yourself.

10 A. Okay.

11 Q. Now, let me just ask you, you don't know and
12 don't have an opinion about whether or not that
13 estimate was a good estimate, not a good estimate?
14 You weren't asked to focus on that, right?

15 A. Which estimate?

16 Q. The estimate referenced in paragraph 4 of
17 your report.

18 A. Yeah, true, yes.

19 Q. Okay, so let me then focus you on what
20 Professor Nash says about your opinion. You see where
21 it says on page 3 of Exhibit 15, quote, "Opinion 4
22 asserts that Herley did not disclose in its estimates
23 of labor hours" -- I'm sorry, let me start again.
24 "Opinion 4 asserts that Herley did not disclose that

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1 also include, so it's -- this is not, with all respect
2 to Ralph Nash, this isn't meant to be an exhaustive
3 list of what the costs --

4 Q. Sure.

5 A. And as he has written in his books.

6 Q. Can you cite to me a case from anywhere,
7 whether it be from an administrative board, a court,
8 anywhere, where anybody -- any body has held that
9 prior sales prices constitute cost and pricing data?

10 A. I'll let that up to you lawyers. I'm not
11 familiar with a case.

12 Q. Okay.

13 A. I'm not saying there isn't one. I'm just --
14 that's not something I do, is to summarize cases like
15 that.

16 Q. Okay. Do you keep abreast of the decisions
17 relating to the scope of cost and pricing data and
18 other FAR issues?

19 A. Generally, yes. Any time we could break
20 would be great for a bathroom break here.

21 MR. SMITH: We can take a break now.

22 (Recessed at 2:48 p.m.)

23 (Reconvened at 2:54 p.m.)

24 BY MR. SMITH:

1 its estimates of labor hours were based on a," quote,
2 "worst-case basis," closed quote, "and that they
3 contain a contingency," period. "As in the case of my
4 comment on opinion 1," comma, "there is a contention
5 that Herley did not disclose its estimating logic,"
6 hyphen, "a failure for which the FAR provides no
7 remedy," period.

8 A. No penalty.

9 Q. Penalty, I'm sorry, no penalty, period. "To
10 put it another way," hyphen, "there is no requirement
11 in the FAR that estimates be," quote, "accurate,"
12 closed quote. Do you see that?

13 A. I do.

14 Q. Okay. Let's just focus on that last
15 sentence, quote, "To put it another way," hyphen,
16 "there is no requirement in the FAR that estimates be
17 accurate." Do you see that?

18 A. I do.

19 Q. Do you agree with that?

20 A. I would say generally, yes.

21 Q. You're saying that Herley in this instance
22 was required to disclose its estimating logic?

23 A. Yes.

24 Q. Okay, and what is the basis for that

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1 opinion?

2 A. Well, they had a request from the government
3 to give them, you know, backup to their estimates,
4 which they did. They went through and --

5 Q. Yes.

6 A. -- I'll use the phrase backed into the total
7 of 41 hours per item, and when they did that, the
8 deposition testimony says to get there, they just said
9 assume a complete failure at every -- at every step
10 and the worst that could happen, go wrong, that's how
11 you should put this together.

12 Q. And who testified to that?

13 A. That was --

14 Q. If you know.

15 A. I do know. Gallagher.

16 Q. Okay.

17 A. So that -- so if -- if that were the case, I
18 mean, if you and I were negotiating, I think you'd
19 want to know that by the way, my 41 hours is a
20 worst-case scenario. I'm not -- it's not really my
21 best estimate, but it's if everything goes wrong,
22 that's what I think.

23 Q. Was there a basis to create an estimate
24 based upon a worst-case scenario?

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1 MR. PRESS: Objection.

2 A. I don't necessarily think so in this case.

3 Q. And the example that you just used about
4 well, if you and I were negotiating, you would want to
5 know, there's lots of things I'd want to know, right?
6 I may want to know, for example, what your bottom line
7 is, right?

8 A. Uh-huh.

9 Q. Do you have to tell me?

10 A. Well, eventually if you want to cut a deal,
11 huh?

12 Q. Well, but for all we know, during the
13 negotiations, you might have been willing to go a
14 little bit lower. Are you required to disclose that?
15 Because I'd want to know that.

16 A. No, but a bottom-line estimate, what you
17 will take as a price on a job is very different from
18 your estimating logic as to how you got to a cost
19 estimate with respect to the item.

20 Q. So what you're saying is that even though
21 this was judgmental, the fact that it was a worst-case
22 scenario made it a mandatory disclosure?

23 A. I think in these circumstances, they should
24 have disclosed the basis for how they got to those

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1 estimates.

2 Q. Because it was a worst-case scenario?

3 A. Well, you should disclose the basis of your
4 estimates, and it was totally relevant to coming up
5 with the price to be negotiated.

6 Q. Does that mean that any time that you have
7 an estimate and exercise judgment, you have to
8 disclose your methodology?

9 A. I hesitate to say any time. I'm looking at
10 this particular fact circumstance. I think in this
11 fact circumstance, given how they came up with that
12 approach, given the fact that they magically arrived
13 at a 41 technician hours per item and that that number
14 happens to match exactly where they were before, I
15 would think how they got to that number was
16 information they should have disclosed to the
17 government.

18 Q. Okay, and you think that because? Do you
19 understand my question?

20 A. No, I thought you were still thinking.

21 Q. No, no, no. I was hoping for you to
22 complete the sentence, but let me do it a little bit
23 differently.

24 A. Okay.

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1 Q. Just so there's no mystery to this, I fully
2 expect that a person who's recognized as one of the
3 foremost experts in the world on government
4 contracting is going to say you're wrong.

5 A. You're going to make me blush. Oh, you're
6 talking about someone else.

7 Q. Yeah, I'm talking about Professor Nash,
8 right? And you and he disagree, and I'm trying to
9 understand why he says it wasn't required to be
10 disclosed and you say it was.

11 A. Okay, well --

12 Q. So I'm trying to understand what it is that
13 makes you think it was required other than if you're
14 saying look, that's my judgment and it's based upon my
15 years of experience and my understanding of the FAR,
16 that's it, Smith, and move on.

17 A. Right, I think there's three issues, and
18 bear with me. First is -- and you may disagree with
19 this, but I think --

20 Q. I'll tell you if I do.

21 A. If you read his report, he -- Mr. Nash says
22 under part 15, you are required to disclose a
23 contingency. Assume that for a moment. So I don't
24 think there's any question that we agree -- you're

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1 trying to find areas of disagreement. We agree that
 2 you have to disclose a contingency. We disagree that
 3 he says however, if you don't, it may be a FAR
 4 violation but there's no impact to the proposal price
 5 because it's not cost and pricing data. So that's
 6 where we disagree. His opinion here, number 4, he
 7 said there's no requirement in the FAR that the
 8 estimates be accurate. That's not even the issue, so
 9 I don't even -- we certainly don't agree on that
 10 sentence, but that's not the issue. The issue is
 11 clearly and cleanly whether they should have disclosed
 12 it, and I think we're in agreement. He just says
 13 there's no impact if you don't.

14 Q. Is there an impact if you don't?

15 A. I think in this case there is. I think if
 16 they would have disclosed the fact that they had
 17 whacked up these estimates for the labor hours to back
 18 into the 41 hours that they had originally, to back
 19 into the \$20,000 price that they were coming up with,
 20 and that all of that was just after the fact a
 21 summarization of numbers, I think if they would have
 22 just disclosed that to the government, that would have
 23 made a difference in the negotiation of the price.

24 Q. Now, this backing into that -- well, you

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1 know what? I'll just save that for trial. Okay,
 2 let's move on to opinion 5. Why don't you read
 3 opinion 5 in your report to yourself.

4 A. Got it.

5 Q. Can you show me where this six months of
 6 actual cost data is?

7 A. Yes, in the binder, tab 5-1.

8 Q. Tab 5?

9 A. Tab 5, pages 5-1.

10 Q. What data is captured in here?

11 A. In there, the technician time and the --
 12 some of the engineering time to produce the first --
 13 well, part of the first 42, but then Herley uses 32
 14 elements is summarized there.

15 Q. Okay, so let's just figure this out. This
 16 -- where did this document come from?

17 A. It was provided to us -- it's a
 18 Herley-produced document.

19 Q. Okay.

20 A. At the top of the page, there's a Bates
 21 stamp, so I just assume it was produced from Herley's
 22 files.

23 Q. Okay. How was it produced?

24 A. I don't know.

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1 Q. What information was intended to be captured
 2 in the document?

3 A. Based upon subsequent correspondence from
 4 Herley back to the government, it was represented to
 5 be the actual hour experience for elements that had
 6 been built up through in this case the data stops on
 7 12/14/01, but it became part of a file and submission
 8 in February of 2002 from Herley to the government.

9 Q. Now, what -- you're referring to another
 10 tab?

11 A. Yes, in tab -- in tab 7, there's more
 12 information with respect to this issue.

13 Q. Okay. Show me which document in tab 7
 14 connects with the information in tab 5.

15 A. Okay, if you look at the first page --

16 Q. Yes.

17 A. This is question 1, what is their actual
 18 hour experience from the current number of element
 19 bills, do you see that? That's the first question,
 20 number 1.

21 Q. Yes.

22 A. And they answer it with here's certain
 23 information, and this is in February of '02.

24 Q. Okay, and that's the letter dated February

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1 21st, 2002 from Rounsaville.

2 A. Right.

3 Q. Okay.

4 A. And then if you go back a few pages, you'll
 5 see an e-mail not to the government, but from Rosalie
 6 Schachter. It's 7-3 in the upper right-hand -- before
 7 -- no, you're way too as far. Back, back, right
 8 there. An e-mail from Rosalie Schachter to Lee Blatt.

9 Q. Uh-huh.

10 A. That there were some questions he apparently
 11 asked in an e-mail, but she says the actual labor
 12 hours for the current number of elements is 820. Then
 13 if you go back two pages, you'll see a summary of the
 14 820, those hours. Do you see that?

15 Q. Uh-huh.

16 A. Okay, and then if you go to the next page, I
 17 have another copy of the same document we were looking
 18 at back in tab 5 --

19 Q. Right.

20 A. -- that comes to that same 820. It's
 21 actually 821.

22 Q. Okay. And how many elements were built
 23 during this period of time?

24 A. If you go back two pages to a document we

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1 didn't look at, right there, right under the thing
2 that says shipped, 42 repairs, but it says assume we
3 had ten that weren't tested now, so I'm going to
4 divide this by 32, then it does some calculations to
5 come up with what the estimates of hours per element
6 were.

7 Q. Okay, I understand this is an estimate that
8 you're making reference to, but the data here --

9 A. Yeah.

10 Q. -- that's a part of tab 5 --

11 A. Yes.

12 Q. These are entries by John Kenny, Christopher
13 Crane. I'm assuming you don't recognize any of these
14 names, right?

15 A. These are just workers, yeah.

16 Q. Are they technicians, engineers or both?

17 A. They're both. Based upon the analysis at
18 the end, they're both technicians and engineers.

19 Q. Okay, and how many -- does this document
20 tell us how many elements were built during this
21 period of time?

22 A. I don't think this document does. The
23 document that they use then to summarize it does.

24 Q. And that's the document that's in tab 7, the

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1 estimate?

2 A. Yes.

3 Q. Okay, and what was the basis for the
4 estimate that there were 32 elements built?

5 A. I don't know.

6 Q. Who did it?

7 A. Tuckman.

8 Q. Tuckman did it?

9 A. That's my understanding.

10 Q. Who said that Tuckman did it?

11 A. I don't know. I have written on the top of
12 the page "Tuckman."

13 Q. Is this his handwriting?

14 A. Don't know, but what I do know is that if --
15 if you look at the information, they divided it by 32.
16 They said 42 were done, however, let's assume ten
17 weren't yet a hundred percent tested, therefore, let's
18 divide by 32. See what I'm saying?

19 Q. I understand.

20 A. Yeah.

21 Q. Do you know who created this document?

22 A. Someone at Herley, but I have written down
23 Tuckman, so it seems like I asked that question once
24 before and somebody either told me Tuckman or this was

1 prepared at his direction.

2 Q. Any testimony that you referred to?

3 A. It could be. I just don't remember.

4 Q. Okay, and do you know if this estimate was
5 based upon a series of assumptions that turned out to
6 be inaccurate?

7 A. Say that again. I'm sorry.

8 Q. Do you know if this estimate was based upon
9 a series of assumptions that later turned out to be
10 inaccurate?

11 A. I don't think so. I mean, I think it -- the
12 information -- if you look in the end of 7, you'll see
13 an e-mail in March of '02, which is even later, and
14 there they said we completed 32 elements and they
15 refer again to this same number. So as of March of
16 '02, they hadn't identified any problems with their
17 data. See, and they show that tech elements of 20.2,
18 but then that's somehow translated -- forwarded to the
19 government as 31.8.

20 Q. Was Mr. Gallagher questioned about this
21 document?

22 A. Yeah, I don't know. I have -- this is where
23 I guess I have the reference to Tuckman where he's
24 transmitting the data.

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1 Q. And you know Mr. Tuckman didn't offer any
2 testimony in the case, right?

3 MR. PRESS: Objection.

4 A. I think he pled the fifth or something like
5 that.

6 Q. Okay. Let's move on to opinion number 6.

7 A. Yeah.

8 Q. Why don't you take a moment and review your
9 opinion to refresh your recollection.

10 A. Got it.

11 Q. What particular data are you making
12 reference to in opinion number 6 here? Is this the
13 run 4?

14 A. Yes.

15 Q. Okay. Now, the difference between your
16 opinion and Professor Nash's opinion, you've read what
17 he has to say, right?

18 A. Yeah.

19 Q. Okay, and among other things, he makes
20 reference to evidence that personnel believed the
21 yield rate was aberrational and somewhat suspect. Do
22 you see that?

23 A. I do see that.

24 Q. Did you come across any such evidence in

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1 your review of the file?
 2 A. I didn't see any evidence of that. There
 3 may have been some statements that some of the Herley
 4 witnesses said that.
 5 Q. Isn't that evidence?
 6 A. I don't think it's evidence when you -- when
 7 you then admit into a plea where you agree that that
 8 -- that you withheld results of run 4 with the intent
 9 to deceive the auditors and that Herley should have
 10 disclosed this data in response to the auditors'
 11 inquiries, I don't -- I don't frankly feel a need to
 12 go much further than that and analyze whether or not
 13 someone at Herley might have concluded that it could
 14 have been aberrational and therefore, maybe it kind of
 15 should be disclosed to the government. I never went
 16 down that path. I didn't quite understand Mr. Nash's
 17 even going into those waters.
 18 Q. Well, let's just consider this. One
 19 possible avenue that was available to Herley -- the
 20 Herley people that were involved in the decision not
 21 to disclose run 4 was to turn it over to the
 22 government and argue that it's meaningless because
 23 it's aberrational, right?
 24 MR. PRESS: Objection.

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1 A. Could they have done that, yes.
 2 Q. Right.
 3 A. They didn't do that.
 4 Q. That's true, and that theoretically could
 5 have avoided problems.
 6 MR. PRESS: Objection.
 7 BY MR. SMITH:
 8 Q. Right?
 9 A. Theoretically.
 10 Q. Okay. Let's go to opinion number 7. Take a
 11 moment and review to yourself your opinion.
 12 A. Got it.
 13 Q. Is there any particular tab in Exhibit
 14 Number 1 that you believe supports these assertions?
 15 A. Yes.
 16 Q. Which tab?
 17 A. We already touched on it a little bit. Tab
 18 7.
 19 Q. Seven.
 20 A. Yeah.
 21 Q. Okay. And you're making reference to the
 22 second power fit head contract or the first?
 23 A. Here initially -- yeah, that's where the
 24 representation was made for the second. By February

1 of '02 and the data through 12/14/01, that first
 2 contract was already signed. Now, I will -- I will
 3 say just so the record's clear, that's what I meant --
 4 that's what I discussed here. In reality, I don't
 5 know whether there was other data available in July of
 6 '01 at the time of signing that first power head
 7 contract. Here I have a document showing from May
 8 through December 14th of '01, so clearly -- and that
 9 document became part of a response by Herley that I
 10 think was not factual. But whether there was other
 11 cost and labor information, I'm not quite sure why
 12 there wouldn't be cost information prior to May '01 on
 13 other element and power head labor runs, but I haven't
 14 seen any, but I don't know why there wouldn't have
 15 been, but here specifically we have a document where
 16 clearly they show the government some information
 17 right around or the day after I guess the agreement on
 18 price, and I don't think it accurately represented
 19 what was -- what was in the record.
 20 Q. When did this information become available?
 21 A. Well, theoretically, since it's May of '01,
 22 it would be available any time someone queried the
 23 database. This particular one shows information
 24 through 12/14 of '01.

1 Q. When was the contract signed?
 2 A. 2/21 or 2/20/02.
 3 Q. Okay. Let's go on to opinion number 8.
 4 Now, in opinion number 8, I'm not sure what it is
 5 precisely you're being critical of, so maybe you can
 6 tell us.
 7 A. Yeah, I think as Mr. Nash points out, that
 8 I'm not pointing to a particular piece of factual
 9 information that wasn't -- I am in fact looking at
 10 this estimating practice, and if you just try to
 11 connect the dots, you can't help but reach the
 12 conclusion that something doesn't seem to be right
 13 when you're baking into a subassembly estimate 2 to 3
 14 thousand dollars worth of materials even though you
 15 were showing that it should be more like 645
 16 historically, and the actual, when it happened later,
 17 you checked it out, it was 360. So I guess I'm -- I
 18 guess I'm just generally making an observation that
 19 those three connected dots, especially coupled with
 20 the allegation by Blatt or his statement that right up
 21 until he signed the contract, he was going to ship
 22 this stuff out to Lancaster and then had a change of
 23 heart immediately thereafter and decided to, no, keep
 24 it in house where it was.

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1 Q. Who had the change of heart?
 2 A. Blatt.
 3 Q. Who said that?
 4 A. I think he did. Yeah, he -- they were going
 5 -- they were going to farm it out, and that's why they
 6 had this subassembly estimate for \$9,300, or \$9,000,
 7 I'm sorry, and then it ended up, they never did it at
 8 Lancaster and they all did it in house at Farmingdale.
 9 Q. When did Mr. Blatt find out that the
 10 subassembly was not built in Lancaster?
 11 A. No, he decided not to build it in Lancaster.
 12 Q. What witness said that?
 13 A. Huh?
 14 Q. What witness said that?
 15 A. I think Blatt did.
 16 Q. Why don't you show me where Mr. Blatt said
 17 that in his deposition.
 18 A. Okay, the testimony I have shows that he
 19 directed that it would be moved to Herley Farmingdale
 20 to Herley Lancaster. That's in his -- in Blatt's
 21 testimony.
 22 Q. Well, that's in keeping with the way it was
 23 proposed, right?
 24 A. Right, that's how it was proposed, and then

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1 the assumption is, and I don't have a reference to
 2 that, but my understanding was that, and I'm assuming
 3 that right after award, Herley directed the
 4 manufacture occur at Farmingdale, not be moved to
 5 Lancaster, and that's where they have it.
 6 Q. Okay, so you're assuming that to be the
 7 fact.
 8 A. I'm assuming, yes.
 9 Q. And you can't point to any Blatt testimony
 10 to that effect, right?
 11 A. Not on that issue.
 12 Q. And again, just getting back to opinion
 13 number 8, I'm still -- are you offering opinions in
 14 opinion number 8 that there was wrongdoing here or are
 15 you just making observations?
 16 A. I think on that one it's more of an
 17 observation.
 18 Q. Okay.
 19 A. Just that the dots don't connect and --
 20 Q. All right, well then let's move on to where
 21 you're offering opinions. Let's go on to number 9.
 22 A. Yes.
 23 Q. Okay, have you looked at 9?
 24 A. Yes.

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1 Q. Okay. What is the basis for your opinion
 2 that the materials that had allegedly been purchased
 3 for repairs were in fact utilized for manufacturing
 4 the subassemblies?
 5 A. A couple things. Witness statement of --
 6 let me just find it here. Let's see. Such materials
 7 are in fact -- that would be Gallagher's deposition.
 8 Q. Okay. Let me ask you this.
 9 A. Yes.
 10 Q. If you look at Professor Nash's opinion, he
 11 says, quote, in pertinent part, "If the company had
 12 made a decision not to use the material purchased for
 13 repairs to perform the contract and had not reversed
 14 this decision before the contract was awarded, there
 15 is no violation of the requirement to disclose cost or
 16 pricing data." Do you see that?
 17 A. I do.
 18 Q. Do you agree with that?
 19 A. I think generally yes.
 20 Q. So would you agree with me that this is an
 21 issue that's really going to turn on the facts?
 22 A. Yes.
 23 Q. And when the decision was made not to go
 24 forward in Lancaster but to go forward in Farmingdale

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1 with the subassemblies, right?
 2 A. No, this is the repairs issue, yeah. This
 3 is --
 4 Q. Fair point. By extension then --
 5 A. Yeah, if you're going to make the decision
 6 that they actually were going to use all those repair
 7 kits --
 8 Q. Okay.
 9 A. And --
 10 Q. And so you and he really don't disagree.
 11 It's just a question of timing, when were decisions
 12 made.
 13 A. Yeah, in a general opinion or comment, I
 14 don't disagree with what he's saying. It just all
 15 hinges on the facts.
 16 Q. Okay, all right. Your opinion number 10
 17 focuses on the hundred thousand dollar expenditure,
 18 and that's another timing issue, as I appreciate it,
 19 right?
 20 A. Yes.
 21 Q. Let's look at what the professor says. He
 22 says, quote -- I'm reading the pertinent part. "Only
 23 if this is factually correct would it constitute a
 24 failure to disclose," quote, "accurate," closed quote,

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1 "cost or pricing data." Do you agree with that?

2 A. Yes.

3 Q. And what would have to be factually correct
4 is that Herley stated that it had authorized the
5 expenditure of a hundred thousand dollars to improve
6 its manufacturing process but it had not done so,
7 right?

8 A. Yeah, and I would go on, because they
9 reference in the manufacturing process, you know, and
10 tooling, so that, you know -- but yeah, it would hinge
11 -- this one again would hinge on the facts.

12 Q. Okay, okay. Let me just -- okay. Tell me
13 about your educational background.

14 A. I have a Bachelor of Science degree summa
15 cum laude from the University of Scranton in Scranton,
16 Pennsylvania, and an MBA in -- well, MBA is a general
17 degree, but with an emphasis on procurement and
18 contracting from G.W.

19 MR. SMITH: Let's go off the record for a
20 second.

21 - - -

22 (Discussion off the record)

23 - - -

24 BY MR. SMITH:

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1 Q. You then got an MBA, sir?

2 A. Yes.

3 Q. Where did you get it from?

4 A. George Washington.

5 Q. And in what year?

6 A. 1980.

7 Q. And you're a certified public accountant?

8 A. Yes.

9 Q. And when did you get the certification?

10 A. 1977.

11 Q. And I'm sure everybody asks you, did you
12 pass the first time?

13 A. Three parts, and I got the last one the next
14 time.

15 Q. I'm sorry, you got the last one --

16 A. The next time.

17 Q. Okay, okay, and you started your
18 professional career at Coopers & Lybrand?

19 A. Yes.

20 Q. And you were involved in government contract
21 services group, if I recall?

22 A. Yes.

23 Q. Okay. What did you do?

24 A. I was obviously just out of school, so I was

1 an entry-level person. I moved to Washington after
2 spending a year in Philly on the audit staff, and I
3 had the opportunity to go to Washington and I went
4 down there and joined their government contracts
5 services group and got my MBA while I was doing that.

6 Q. And then you left Coopers & Lybrand to go to
7 Rubrino & McGeehin?

8 A. Rubino, yes.

9 Q. Rubino.

10 A. Yes.

11 Q. And what year did you do that?

12 A. 1980.

13 Q. And you've been with that entity through the
14 acquisition by FTI Consulting?

15 A. Correct.

16 Q. So we're talking 27 years.

17 A. Right.

18 Q. Okay, and what does Rubino & McGeehin do?

19 A. Really what Rubino & McGeehin did, it was
20 two really distinct things. One was we had an audit,
21 regular audit and accounting CPA firm, which you would
22 consider a more traditional CPA firm, and that was
23 called Rubino & McGeehin, Chartered, and then we had
24 Rubino & McGeehin Consulting Group, where I spent

1 certainly in the last 15 years or so in that -- in
2 there, and what we did there was pure consulting on
3 government contract or claims or litigation type
4 issues.

5 Q. Okay. Your publications --

6 A. Yes.

7 Q. Have you -- have you published any articles
8 or -- well, let's start with articles, relating to
9 government contracting?

10 A. Yes.

11 Q. Okay, and are your publications all listed
12 on your C.V.?

13 A. Yes.

14 Q. Do any of them have anything to do with cost
15 and pricing data?

16 A. Yes, we -- I think I produced copies of a
17 couple of those. Some -- there was some course
18 materials, if you look at page 12 of my resume, which
19 is attachment 2.

20 Q. Uh-huh.

21 A. The -- there's some course materials that I
22 authored and presented. One was on cost reimbursement
23 contracting for Fed pubs, accounting for U.S. defense
24 contracts for -- in London for Hawksmere, recovering

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1 costs of money. Those three that -- DCAA search for
 2 unallowable interest costs, government contract
 3 audits, ESOPs for government contractors.
 4 Q. Okay, so all your publications are listed on
 5 page 12.
 6 A. Yes.
 7 Q. Have you ever been involved in a situation
 8 where the court has refused to recognize you as an
 9 expert on any particular opinion you wanted to offer?
 10 A. The only -- the only one I've had is I had a
 11 Daubert challenge on a piece -- I was accepted as an
 12 expert and allowed to testify, but on one piece of
 13 testimony, a judge in New York ruled that one aspect
 14 was more an engineering issue than an accounting
 15 issue.
 16 Q. This was Judge Preska?
 17 A. Yes.
 18 Q. And this was the matter of the Morse Diesel
 19 Inc. versus Trinity Industries?
 20 A. Yes, sir.
 21 Q. And in that case, do you recall that the
 22 judge ruled in pertinent part, quote, "I view
 23 McGeehin's testimony as being an insufficient basis
 24 for Trinity's claim for unpaid progress payments since

1 Q. Were you a damages expert?
 2 A. No.
 3 Q. What did you testify about?
 4 A. The application of statement of position
 5 81.1 and how to account for long-term government
 6 contracts.
 7 Q. And over the course of your career, how many
 8 times have you been engaged as an expert?
 9 A. In excess of a hundred.
 10 Q. Okay, and do you tend more to be for the
 11 defense or the plaintiffs?
 12 A. Pretty evenly split.
 13 MR. SMITH: Okay, I have no further
 14 questions. Thank you for coming.
 15 MR. McNEELA: Can we go off the record for
 16 two or three minutes?
 17 - - -
 18 (Discussion off the record)
 19 - - -
 20 MR. PRESS: Plaintiffs have no questions.
 21 MR. SMITH: Thank you very much.
 22 (Whereupon, the deposition was concluded at
 23 approximately 3:35 p.m.)
 24

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1 he provides no factual support for his conclusory
 2 statement that the difference between the contract
 3 price and the money Morse," slash, "Diesel paid
 4 Trinity could only be explained by unpaid progress
 5 payments"?
 6 A. Yes, which that case was appealed and it's
 7 long tortious history, but yes, I remember that.
 8 Q. Was the judge reversed on that issue?
 9 A. The case was retried. I testified in a
 10 second case, but they reversed it on other issues.
 11 Q. Have there been any other times when someone
 12 challenged your qualifications as an expert?
 13 A. Not that I remember.
 14 Q. Has any court or tribunal ever limited your
 15 testimony in any way?
 16 A. Just that one, and again, that was -- that
 17 was more a limitation than a preclusion. I testified
 18 before Judge Preska in that subsequent trial.
 19 Q. Have you ever testified as an expert in a
 20 securities fraud case?
 21 A. Once.
 22 Q. Which case was that?
 23 A. Hercules Industries. It was a derivative
 24 class action suit against Hercules Industries.

1 CERTIFICATE
 2 I hereby certify that the proceedings and evidence
 3 noted are contained fully and accurately in the notes
 4 taken by me in the deposition of the above matter, and
 5 that this is a correct transcript of the same.
 6
 7
 8 KAREN YOUNG
 9
 10
 11
 12 (The foregoing certification of this transcript does
 13 not apply to any reproduction of the same by any
 14 means, unless under the direct control and/or
 15 supervision of the certifying reporter.)
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1 CERTIFICATE OF DEPONENT

2
3 I, PATRICK A. McGEEHIN, have read the entire
4 transcript of my testimony taken on Tuesday, October
5 6, 2009, contained within pages 5 through 208, and it
6 is true, correct and complete to the best of my
7 knowledge, recollection and belief, except for the
8 list of corrections, if any, attached on a separate
9 sheet herewith.

10
11 _____
12 PATRICK A. McGEEHIN DATE

13
14 SUBSCRIBED AND SWORN to before me this _____ day
15 of _____, 2009, in the jurisdiction
16 aforesaid.

17
18 _____
19 My commission expires Notary Public

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1 ERRATA SHEET

2 CASE CAPTION: IN RE HERLEY INDUSTRIES

3 DEPONENT: PATRICK A. McGEEHIN

4 PAGE LINE CORRECTION

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